

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

<hr/>	:	CASE NO. 1:09-MD-2084-TWT
IN RE ANDROGEL ANTITRUST	:	
LITIGATION II	:	DIRECT PURCHASER CLASS
	:	ACTIONS
	:	
	:	DIRECT PURCHASER
	:	INDIVIDUAL ACTIONS
<hr/>	:	
ROCHESTER DRUG CO-	:	
OPERATIVE, INC.,	:	
Plaintiff,	:	
v.	:	CASE NO. 1:09-CV-956-TWT
	:	
UNIMED PHARMACEUTICALS,	:	
INC., ET AL.,	:	
Defendants.	:	
<hr/>	:	
LOUISIANA WHOLESALE DRUG	:	
CO., INC., ET AL.,	:	
Plaintiffs,	:	
v.	:	CASE NO. 1:09-CV-957-TWT
	:	
UNIMED PHARMACEUTICALS,	:	
INC., ET AL.,	:	
Defendants.	:	
<hr/>	:	
MEIJER, INC., ET AL.,	:	
Plaintiffs,	:	CASE NO. 1:09-CV-958-TWT
v.	:	
	:	
<hr/>	:	
UNIMED PHARMACEUTICALS,	:	

**INC., ET AL.,
Defendants.**

**STEPHEN L. LAFRANCE
PHARMACY, INC., ET AL.,
Plaintiffs,**

V.

**UNIMED PHARMACEUTICALS,
INC., ET AL.,
Defendants.**

**RITE AID CORPORATION, ET AL.,
Plaintiffs,**

V.

**UNIMED PHARMACEUTICALS,
INC., ET AL.,
Defendants.**

**WALGREEN CO, ET AL.,
Plaintiffs,**

V.

**UNIMED PHARMACEUTICALS,
INC., ET AL.,
Defendants.**

**SUPERVALU, INC.,
Plaintiff,**

—

CASE NO. 1:09-CV-2913-TWT

CASE NO. 1:09-CV-2776-TWT

CASE NO. 1:09-CV-3019-TWT

CASE NO. 1:10-CV-1024-TWT

v.

**UNIMED PHARMACEUTICALS,
INC., ET AL.,
Defendants.**

:
:
:
:
:
:
:

**DIRECT PURCHASER PLAINTIFFS' REPLY
MEMORANDUM IN SUPPORT OF THEIR MOTION TO
COMPEL DEFENDANTS TO PRODUCE WITNESSES ON
PATENT MERITS ISSUES FOR DEPOSITION**

Defendant Solvay has unilaterally imposed a moratorium on discovery relating to patent issues in this case by refusing to produce duly noticed witnesses for depositions. Rather than seek a protective order from this Court as the law requires, *see e.g., Hepperle v. Johnston*, 590 F.2d 609, 613 (5th Cir. 1979); *Kelly v. Old Dominion Freight Line, Inc.*, 376 Fed. Appx. 909, 913 (11th Cir. 2010), Solvay has decided that patent discovery will not go forward until this Court rules on its pending motion to disqualify Plaintiffs' counsel. As Plaintiffs set forth in their opposition to Solvay's disqualification motion (Doc. No. 236), there is no basis for the extraordinary relief it seeks yet Solvay has acted as if its motion has been granted.

Solvay does not dispute that it never sought a court order relieving the witnesses under its control from appearing for their properly noticed depositions.

See Doc. No. 250 at 1-2. Solvay now admits that *it* – acting without court order – conditioned the patent depositions on the outcome of the counsel disqualification motion. *Id.* at 1. As the dates in Plaintiffs’ notices of deposition have passed, Solvay and the witnesses under its control, Sandra Faulkner, S. George Kottayil, Robert E. Dudley, and Ronald Swerdloff, have defaulted on their obligation to appear for their depositions. For this reason alone, this Court should grant Plaintiffs’ motion and order that these witnesses be produced for deposition.

Solvay contends that this motion is moot because it has offered to schedule patent depositions in late May or early June, *see* Doc. No. 250-1. The offer is completely disingenuous and pretextual, however, since Solvay proclaims that it “cannot allow” any Plaintiffs counsel to depose Solvay’s patent witnesses because they may be tainted. Doc. No. 250-3. More importantly, it is for this Court – and not Solvay – to determine whether properly noticed depositions should go forward.

The instant motion to compel is not identical to Defendant’s disqualification motions, as Solvay misrepresents. Doc. No. 250 at 2. This motion is about Defendants’ disregard for the rules of civil procedure by failing to appear, or obtain a protective order relieving witnesses under Solvay’s control from appearing, for their properly noticed depositions – an issue not covered in the disqualification motions.

As Solvay does not dispute that it has defaulted on its obligation to produce witnesses under its control for their properly noticed depositions, this Court should grant Plaintiffs' motion to compel and order that Sandra Faulkner, S. George Kottayil, Robert E. Dudley, and Ronald Swerdloff appear for deposition.

Respectfully submitted,

Date: April 29, 2011

/s/ Kenneth S. Canfield

Kenneth S. Canfield
Ga. Bar. No. 107744
kcanfield@dsckd.com
1355 Peachtree Street, Suite 1600
Atlanta, Georgia 30309
Telephone; (404) 881-8900
Facsimile (404) 881-3007

Bruce E. Gerstein, Pro Hac Vice
bgerstein@garwingerstein.com
Joseph Oppen, Pro Hac Vice
jopper@garwingerstein.com
Elena K. Chan, Pro Hac Vice
echan@garwingerstein.com
GARWIN GERSTEIN & FISHER LLP
1501 Broadway, Suite 1416
New York, NY 10036
Telephone: (212) 398-0055
Facsimile: (212) 764-6620

David F. Sorensen, Pro Hac Vice
dsorensen@bm.net
Eric Cramer, Pro Hac Vice
ecramer@bm.net
Ellen Noteware, Pro Hac Vice
enoteware@bm.net
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Telephone: (215)-875-4683
Facsimile: (215)-875-4604

David P. Smith
dpsmith@smithfoote.com
W. Ross Foote
rfoote@smithfoote.com
Susan Segura

Joshua P. Davis (SBN. 193254)
davisj@usfca.edu
LAW OFFICES OF JOSHUA P.
DAVIS
437A Valley Street

ssegura@smithfoote.com

THE SMITH FOOTE LAW FIRM LLP
720 Murray Street
P.O.Box 1632
Alexandria, LA 71309
Telephone: (318) 445-4480
Facsimile: (318)487-1741

San Francisco, CA 94131
Telephone: (415) 422-6223

John Gregory Odom

jodom@odrlaw.com

Stuart Des Roches

stuart@odrlaw.com

Andrew Kelly

akelly@odrlaw.com

John Fitzpatrick

jfitzpatrick@odrlaw.com

ODOM & DES ROCHES

Poydras Center

650 Poydras Street, Suite 2020

New Orleans, LA 70130

Telephone: (504) 522-0077

Facsimile: (504) 522-0078

David Balto

LAW OFFICES OF DAVID BAL TO

2600 Virginia Ave NW Suite 1111

Washington, DC 20037

*Counsel for Rochester Drug Co-
operative, Inc.*

Russell A. Chorush

rchorush@hpcllp.com

Miranda Jones

mjones@hpcllp.com

HEIM PAYNE & CHORUSH LLP

Chase Tower

600 Travis, Suite 6710

Houston, TX 77002

Telephone: (713) 221-2000

Facsimile: (713) 221-2021

Linda P. Nussbaum

John D. Radice

Grant & Eisenhofer P.A.

485 Lexington Avenue

New York, NY 10017

Telephone: (646) 722-8500

Facsimile: (646) 722-8501

*Counsel for Louisiana Drug Company,
Inc.*

Dianne M. Nast

Joseph M. Vanek

dnast@rodanast.com

Erin C. Burns

eburns@rodanast.com

RodaNast, P.C.

801 Estelle Drive

Lancaster, Pennsylvania 17601

Phone: 717-892-3000

Fax: 717-892-1200

jvanek@vaneklaw.com

David P. Germaine

dgermaine@vaneklaw.com

VANEK, VICKERS & MASINI, P.C.

111 South Wacker Drive, Suite 4050

Chicago, IL 60606

Telephone: (312)224-1500

Facsimile: (312) 224-1510

*Counsel for Stephen L. Lafrance
Pharmacy, Inc.*

Scott E. Perwin

sperwin@kennynachwalter.com

Lauren Ravkind

lravkind@kennynachwalter.com

Kenny Nachwalter, P.A.

1100 Miami Center

201 South Biscayne Boulevard

Miami, Florida 33131-4327

Telephone: (305) 373-1000

Facsimile: (305) 372-1861

Paul E. Slater

pes@sperling-law.com

SPERLING & SLATER

55 West Monroe Street, Suite 3200

Chicago, Illinois 60603

Telephone: (312) 641-3200

Facsimile: (312)641-6492

*Counsel for Walgreens, Inc and
SuperValu.*

Steve D. Shadowen (PA41953)

sshadowen@hangle.com

Hangle Aronchick Segal & Pudlin

30 North Third Street

Harrisburg, PA 17101

Telephone: (717) 364-1030

Facsimile: (717) 364-1020

Joseph R. Saveri (SBN 130064)

isaveri@lchb.com

Eric B. Fastiff (SBN 182260)

efastiff@lchb.com

Jordan Elias (SBN 228731)

jelias@lchb.com

LIEFF CABRASER HEIMANN &
BERNSTEIN, LLP

Embarcadero Center West

Battery Street, Suite 3000

San Francisco, CA 94111-3339

Telephone. (415) 956-1000

Facsimile. (415) 956-1008

Joseph T. Lukens (PA67405)
jlukens@hangley.com
Hangley Aronchick Segal & Pudlin
One Logan Square, Ste. 2700
18th and Cherry Streets
Philadelphia, PA 19103
Telephone: (215) 496-7032
Facsimile: (215) 568-0300

Counsel for Rite Aid Corporation

Donald Perelman
dperelman@fineblack.com
Roberta Liebenberg
rliebenberg@fineblack.com
1835 Market Street, 28th Floor
Philadelphia, Pennsylvania 19103
Telephone: (215) 567-6565
Facsimile: (215) 568-5872

*Counsel for Meijer, Inc. and Meijer
Distribution, Inc.*

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

**IN RE: ANDROGEL
ANTITRUST LITIGATION
(NO. II)**

:
: **Case No. 1:09-md-2084-TWT**
:
: **DIRECT PURCHASER CLASS**
: **ACTIONS**
: **DIRECT PURCHASER**
: **INDIVIDUAL ACTIONS**
:

CERTIFICATION

Submitting Counsel hereby certifies that the text of the foregoing document has been prepared with Times New Roman 14 point, one of the fonts and point selections approved by the Court, and complies in all respects with Local Rule 5.1(C) of the United States District Court, Northern District of Georgia.

Dated: April 29, 2011

By: /s/ Kenneth S. Canfield

Kenneth S. Canfield

Ga. Bar. No. 107744

kcanfield@dsckd.com

1355 Peachtree Street, Suite 1600

Atlanta, Georgia 30309

Telephone; (404) 881-8900

Facsimile (404) 881-3007

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

**IN RE: ANDROGEL
ANTITRUST LITIGATION
(NO. II)**

**:
: Case No. 1:09-MD-2084-TWT
:
: DIRECT PURCHASER CLASS
: ACTIONS
: DIRECT PURCHASER
: INDIVIDUAL ACTIONS**

CERTIFICATE OF SERVICE

I have this day served counsel for all parties in the foregoing matter with a copy of DIRECT PURCHASER PLAINTIFFS' REPLY MEMORANUM IN SUPPORT OF THEIR MOTION TO COMPEL DEFENDANTS TO PRODUCE WITNESSES ON PATENT MERITS ISSUES FOR DEPOSITION by filing the same with the Clerk of Court using the CM/ECF system, which will automatically send an email notification and allow access to the filing to all counsel of record.

Dated: April 29, 2011

By: /s/ Kenneth S. Canfield

Kenneth S. Canfield

Ga. Bar. No. 107744

kcanfield@dsckd.com

1355 Peachtree Street, Suite 1600

Atlanta, Georgia 30309

Telephone; (404) 881-8900

Facsimile (404) 881-3007